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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1180

CHARLES N. ANDERSON AND GRACE M. ANDERSON,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now the Petitioners, Charles N. Anderson and Grace M. Anderson, and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on December 23, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the Tax Court of the United States is reported in 42 T.C. 25, and is provided to this Court pursuant to Supreme Court Rule 23(i) in the form printed for the use

of the Court below. The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 371 F.2d 59, and appears in Appendix A hereto.

JURISDICTION

The judgment of the United States Court of Appeals was entered on December 23, 1966.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. Did ownership of the house at 191 Schoolhouse Lane by Lincoln Lodge Corporation, the nature of Mr. Anderson's employment as a twenty-four-hour-a-day manager-employee of Lincoln Lodge Corporation, Mr. Anderson's occupancy of such lodging for the convenience of his employer, Lincoln Lodge Corporation, and as a condition of his employment by such employer, constitute the subject lodging a part of the business premises of Lincoln Lodge Corporation within the meaning of Section 119 of the Internal Revenue Code, thereby permitting Petitioners to exclude from their gross income for calendar years 1958, 1959 and 1960 the fair rental value of the house at 191 Schoolhouse Lane, the value of laundry and cleaning services provided to the house, the value of the utility expenses of the house borne by Lincoln Lodge Corporation and the value of milk and groceries supplied by Lincoln Lodge Corporation to the Petitioners?

2. Has the Court of Appeals in its opinion below adopted a proper statutory construction of the phrase "on the business premises of the employer" as used in Section 119 of the Internal Revenue Code of 1954 by requiring that "the meals must be furnished or the lodging provided either at a place where the employee performs a significant portion

of his duties or on the premises where the employer conducts a significant portion of his business,'' in order for the value of the meals or lodging to be excluded from gross income? And if so, do Petitioners satisfy the requirements of such a construction in the light of the facts contained in the record?

STATUTORY PROVISIONS AND REGULATION INVOLVED

The statute involved in this case is 26 U.S.C. 1958 Ed. §119:

> ''MEALS OR LODGING FURNISHED FOR THE CONVENIENCE OF THE EMPLOYER
>
> ''Sec. 119 [1954 Code]. There shall be excluded from gross income of an employee the value of any meals or lodging furnished to him by his employer for the convenience of the employer, but only if—
>
> ''(1) in the case of meals, the meals are furnished on the business premises of the employer, or
>
> ''(2) in the case of lodging, the employee is required to accept such lodging on the business premises of his employer as a condition of his employment.
>
> ''In determining whether meals or lodging are furnished for the convenience of the employer, the provisions of an employment contract or of a State statute fixing terms of employment shall not be determinative of whether the meals or lodging are intended as compensation.''

The Federal Tax Regulation involved in this case is found in 26 C.F.R. §1.119-1 and have been set forth in Appendix B for your reference.

STATEMENT OF THE CASE

Charles N. Anderson, herein sometimes referred to as Anderson or the taxpayer, was employed by the Lincoln Lodge Corporation as manager of the Lincoln Lodge Motel,

herein referred to as the Motel, located in Columbus, Ohio. Anderson had been the Motel's manager since its opening in 1956, and continued as such during the calendar years 1958, 1959 and 1960, the three taxable years here in question. Grace M. Anderson, the taxpayer's wife, is one of the Petitioners herein solely because she filed joint returns with the taxpayer for the taxable years in question, and for ease of presentation will not be here considered as the taxpayer.

From the time of its opening on July 1, 1956 until July, 1957, taxpayer, his wife and three children lived in two rooms of the Motel. It became evident during this time that the two-room living arrangement was inadequate to accommodate properly the taxpayer and his family, and the employer thereupon explored alternatives for correcting the problem. After considering the loss of revenue from rooms presently occupied by the taxpayer (approximately $7200 per year) and the projected loss of additional revenue due to the taxpayer's need for further space in the Motel, the employer decided to locate an available house in the adjacent subdivision and move the taxpayer and his family out of the Motel and into such house. The employer considered and rejected the taxpayer's preference for a much larger house more distant from the Motel, since it was the employer's desire to keep the taxpayer as close to the Motel as possible. Upon investigation, the employer chose the closest available property zoned for single residence, purchased such property and had constructed thereon a five-room, single family ranch style residence which size and type of house were solely determined by the developer of the subdivision. The house so constructed was located two short blocks from the Motel in an adjacent subdivision. The house was approximately a four-minute walk or a two-minute drive from the main lobby of the Motel.

In July of 1957 the taxpayer and his family moved into the house and resided there without the payment of rent. The employer also furnished to the taxpayer and his family laundry and cleaning services, milk, the utility expenses of the house and reimbursement for certain staple groceries purchased by the taxpayer.

The taxpayer as manager of the Motel was required to be available on a 24-hour-a-day basis in order to oversee reservations made by Motel guests, to handle complaints of Motel guests, to supervise the sale of food and beverages in the Motel and to handle complaints in connection with the service in the restaurant. For this reason the taxpayer was required by the Lincoln Lodge Corporation, as a condition of his employment, to live in the above noted house at 191 Schoolhouse Lane.

The taxpayer did not include in his 1958, 1959 and 1960 tax returns the fair rental value of the home in which he and his family were living, the value of the utilities, the laundry service, the cleaning service, or the milk furnished by the Lincoln Lodge Corporation, and the reimbursements received for amounts expended for groceries in his 1958, 1959 and 1960 returns. The Commissioner of Internal Revenue issued a deficiency notice for each of the above years including therein the items above mentioned, and the controversy was ultimately tried in the Tax Court of the United States pursuant to 26 U.S.C. §7442.

The Tax Court found the fair rental value of the house to be $1920 per year, the value of the utilities furnished to be $600 per year, the value of the laundry and cleaning services to be $600 per year, and the value of the milk and groceries to be $1800 per year.

The Tax Court then found that the fair rental value of the house, the value of the utilities furnished, the value

of the laundry and cleaning services, and $300 per year of the $1800 per year value of milk and groceries should be excluded from the yearly gross income of the taxpayer on the basis of Section 119 of the Internal Revenue Code. (See Tax Court opinion provided to this Court pursuant to Supreme Court Rule 23(i).

Upon appeal by the Commissioner of Internal Revenue, the Sixth Circuit Court of Appeals reversed the Tax Court (Appendix A hereto) stating that the Court had improperly considered the house in which the taxpayer and his family resided as part of the "business premises" of the employer. In so doing, the Court of Appeals considered the single issue of whether the "business premises" requirement of Section 119 of the Internal Revenue Code had been satisfied.

It is from this decision that the taxpayer has filed his petition for Writ of Certiorari with the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

1. The Court below has rendered a decision in conflict with the decisions of two other Courts of Appeals on the same matter.

In the cases of *United States v. Barrett*, 321 F.2d 911 (C.A. 5, 1963) and *United States v. Morelan*, 356 F.2d 199 (C.A. 8, 1966), the respective Courts saw fit to adopt a broad interpretation of the statutory phrase "on the business premises of the employer" found in Section 119 of the Internal Revenue Code of 1954 (28 U.S.C. 1958 Ed. §119). In both of these cases the issue confronting the Court was whether the cost of meals consumed by state highway patrolmen near or adjacent to the highway, on the private premises of a restaurant, was excludable under Section 119 from the gross income of such patrolmen.

The Court in the *Barrett* case, *supra,* stated at page 912:

> "The Commissioner takes too narrow a view of what constitutes the 'business premises' of the Mississippi Highway Patrol. The major 'business' of this state law enforcement agency is obviously not confined to isolated station houses; rather it covers every road and highway in the state twenty-four hours a day every day. In view of the special nature and function of the highway troopers' work, it is unrealistic to treat the employer's place of business as limited to state patrol headquarters. This criterion, therefore, is not decisive against the excludability of the same here in question."

And the Court in the *Morelan* case, *supra,* stated at page 203, "It would seem to be patently obvious that restaurants near or adjacent to highways are, in this case 'on the business premises of the employer' " due to the fact that such patrolmen remained "on call" and available for emergency duty while in such restaurants. The Court further concluded at page 203 that "Congress did not put geographic bounds on the business premises of the employer."

Against the backdrop of the *Morelan* and *Barrett* cases, *supra,* and the Court's findings therein, we fail to see how the majority opinion of the Court of Appeals for the Sixth Circuit in the instant case can be reasonably distinguished on the basis of the statutory construction sought to be given to the phrase "on the business premises" of the employer in that opinion.

On the matter of facts, the *Morelan* and *Barrett* cases, *supra,* and the Anderson case have striking similarities. While in restaurants near the highways Morelan and Barrett patrolled, they were found to be in an "on call" duty

status. While in the Schoolhouse Lane property "2 short blocks" from the Motel, Anderson was similarly in an "on call" status. The record clearly establishes, as stated by Judge McAllister in his dissenting opinion, (Appendix A, page 33a) that:

> "In the instant case, Robert Anderson was on twenty-four hour call whether he was at the motel or at the premises furnished by his employer, . . . The house was two minutes away from the motel lobby. During the time he was on the premises furnished for him by his employer, he, being on twenty-four-hour call, necessarily received, as he did at the motel, complaints of guests, questions on reservations, complaints on restaurant service, or inquiries with regard to the supervision of the foods and beveraegs; and, because he was on twenty-four-hour call, he was performing services for the motel at the premises furnished to him whether he disposed of such matters by telephone or whether, upon call, he went to the motel to adjust such complaints, or to take care of the services in question.
>
> "It clearly appears, in the instant case, that being on twenty-four-hour-a-day call was part of the business of Mr. Anderson, as manager of the motel; and it can also reasonably be considered that he was performing this part of his business while he was lodged by his employer in the dwelling provided for him for that expressly understood purpose, as well as when he was at the motel. As in *Morelan,* the premises furnished to Mr. Anderson must be considered business premises of his employer, where he awaits calls on his employer's business, and on which he performs his duties for his employer, in the same sense, if not to the same extent, as he performs those duties in the motel itself."

In the *Anderson* fact pattern, Anderson actually performed work for his employer at the residence property in addition to being available to return to the Motel proper, while in the *Morelan* and *Barrett* cases, *supra*, the patrolmen were not performing the work of their employer while

in the restaurant but were merely available to do so. Furthermore, in *Anderson,* the employer owned the residence involved and directed Anderson to live there as a condition of employment, while in the *Barrett* and *Morelan* fact situations the restaurants were privately owned although meeting the standards of the patrol as to location and caliber.

On the matter of the statutory construction to be given the phrase "on the business premises of the employer," the majority opinion in *Anderson* states that it "is of the opinion that the phrase, 'on the business premises of the employer,' as used in Section 119 means that in order for the value of meals or lodging to be excluded from gross income, the meals must be furnished or the lodging provided either at a place where the employee performs a *significant* portion of his duties or on the premises where the employer conducts a *significant* portion of his business." (Emphasis added!)

We submit that the Courts in the *Morelan* and *Barrett* cases, *supra,* if constrained to apply the test adopted by the majority opinion in the Sixth Circuit Court of Appeals decision, would have reached opposite conclusions. To have done otherwise would have required the finding that the state highway patrolmen, when having meals at private restaurants near the highway, were performing either a significant portion of their duties as patrolmen or a significant portion of the business of the state highway patrol. This conclusion is not warranted by the facts. Barrett and Morelan were not being ordered to particular restaurants for investigative purposes, nor were they required to do more than let their employer know their whereabouts in the event of an emergency. Anderson, in the instant case, was not only "on call", but as supervisor and manager, he was in a position to field his responsibilities by telephone or, if necessary, make the short trip to the Lodge proper.

For all of the above reasons, we submit that the decisions of the Courts of Appeals in the *Morelan and Barrett* cases, *supra,* on the one hand and *Anderson* on the other hand are inconsistent and in conflict not only in the statutory construction to be given to the phrase "on the business premises of the employer" by Section 119 but also in their application of facts to Section 119.

2. The Sixth Circuit Court of Appeals, in rendering its opinion in the instant case, has decided an important question of federal law which heretofore has not been interpreted by the United States Supreme Court. Petitioner submits that the said Court of Appeals in rendering such opinion has proposed and applied a test for Section 119 of the Internal Revenue Code which improperly defines the scope of this Section (Apepndix A, p. 13a).

Section 119 sets out certain requirements which enable a taxpayer to qualify for the statute's exclusion. Nowhere does the statute describe its business premises requirement as a place where a "significant portion" of the employee's work is performed or a place where the employer conducts a "significant portion" of his business.

The utilization of a "significant portion" test not only is contrary to the intended meaning of the statute but will increase a misunderstanding of the statute which is already evidenced by the number of litigated cases involving the Section.

Also, a strict construction of the phrase "on the business premises" could lead to some apparently inequitable results undoubtedly not intended by Congress, such as, permitting a tax exclusion when a residence is located on the same tract, but separated and possibly quite distant from the facility in which services are regularly performed by the employee, while disallowing any tax exclusion where

the residence is more closely located to the primary place of employment but not physically found on the same tract. See *Boykin* v. *Commissioner*, 260 F.2d 249 (C.A. 8, 1958).

The relative importance of the statutory phrase "for the convenience of the employer" and the manner in which Congress intended it to be qualified, if at all, by the phrase "on the business premises of the employer," has been the subject matter of much litigation at the Appellate level and considerable judicial confusion. See *United States* v. *Morelan*, 356 F.2d 199 (C.A. 8, 1966); *United States* v. *Barrett*, 321 F.2d 911 (C.A. 5, 1963); *Boykin* v. *Commissioner, supra; United States Junior Chamber of Commerce* v. *United States*, 334 F.2d 660 (Ct. Cl., 1964).

Due to the significance of this statute, and the probability of further uncertainty resulting from the application of the Sixth Circuit Court of Appeals decision, Petitioners submit that the instant case presents the kind of broad importance which should merit a discretionary review by the United States Supreme Court at this time.

3. Petitioners contend that the Court below in its majority opinion departed from the accepted and usual course of judicial procedure by citing in support of its findings that the residence of Mr. Anderson was not part of the "business premises of the employer," the concurring opinion of Judge Raum in the case of *Dole v. Commissioner of Internal Revenue*, 43 T.C. 697, as affirmed by the Court of Appeals for the First Circuit at 351 F.2d 308. On appeal to the Court of Appeals for the First Circuit, that Court affirmed the *Dole* decision reached by the Tax Court upon the concurring opinion of Judge Raum in a per curiam opinion.

Judge McAllister in his dissenting opinion in the instant case stated (Appendix A, page 38a):

"We have difficulty in perceiving why the per curiam of the Court of Appeals for the First Circuit in *Dole* was based solely on the concurring opinion of Judge Raum in the decision of that case in the Tax Court. The Court of Appeals could well have affirmed the decision of the Tax Court in *Dole*, without reference to the concurring opinion of Judge Raum, which called for the reversal of *Anderson*, for, as Judge Raum said, *Dole* was distinguishable from *Anderson*. *Anderson* was, at that time, on appeal to this court and rested on entirely different facts than those in *Dole*. The decision of the *Dole* case, either in the Tax Court or later in the Court of Appeals, would have no bearing on *Anderson*. We cannot accept the Commissioner's view that the decision in *Dole* in the Court of Appeals for the First Circuit is persuasive authority that the instant case should be reversed, on the reasoning alone of Judge Raum in his concurring opinion in *Dole*, and on his dicta in that case that the Tax Court's opinion and decision in *Anderson* should be overruled.

"While we have great respect for the views of the First Circuit, there appears to be in its opinion in the *Dole* case, insufficient development of the issues, and the resolution of the problem involved lacks the thrust, persuasiveness, and marshalling of argument necessary to overcome the well-reasoned conclusions of all but three of the judges of the Tax Court, whose views were cogently set forth in three different opinions, supporting their prior decision in *Anderson*, as well as the Tax Court's decision itself in *Anderson*, the opinion of the Court of Appeals in *Barrett*, and both the District Court's and the Court of Appeals' decisions in *Morelan*."

We submit that the dicta of a minority view on the Tax Court of the United States, which Court with the exception of Judge Scott had not actually reviewed the facts of the instant case, is not valid authority for a reversal of the Tax Court decision of Judge Scott. The Tax Court in the *Dole* case, *supra*, was not charged with the responsibility of rehearing the *Anderson* case nor was counsel for Anderson given an opportunity to argue its case before either

the full Tax Court or the Court of Appeals for the First Circuit. For the above reasons, we contend that the procedure followed by the Court of Appeals for the First Circuit in indirectly disapproving the *Anderson* decision of Judge Scott through its per curiam decision in *Dole, supra,* and by the Court of Appeals in the instant case in using this per curiam decision and the dicta contained therein as support for the reversal of the Tax Court decision in *Anderson* had the effect of denying the Petitioners a fair hearing of their case by the Circuit Court of Appeals for the Sixth Circuit. By reason of the foregoing, Petitioners found themselves at the Court of Appeals hearing of their case in the unusual position of apparently having to assume the burden of the appeal rather than the Commissioner of Internal Revenue who properly should have carried such burden as the losing party at the Tax Court level.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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